BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A Summary of the Facts as Found in Effect by the Trial Court.

That the petitioner made serious error of fact in submitting his bid or proposal to install 40,000 linear feet of house service pipe at 26¢ per linear foot as result of overlooking and failing to include in the amount bid the cost of the pipe or material; that this error was excusable; that the respondent had information the petitioner had made this serious error in his bid; that the petitioner, when he realized the respondent was going to require him to install more than double the amount of house service pipe called for in the contract, notified respondent of his intention to charge an increased compensation if he was required by respondent to install a quantity in excess of the call of the contract; that petitioner was told to make the installation as ordered, otherwise the installation would be made by the respondent and charged up against the contract. That there was no issue as to the reasonableness of the compensation sought; that the contract called for approximately 40,000 linear feet, and that a liberal approximation of 40,000 feet was 42,000 feet; that petitioner installed an order of respondent 82,978 feet, or 40,978 feet in excess of the specific call of the contract; (R. 253-254); that plaintiff "*is entitled to recover on a quantum meruit basis for the quantity of house service pipe installed in excess of the contract, and his claim in the amount of $6,556.48 for additional compensation at 16¢ per linear foot on 40,978 linear feet is just.*" (R. 260) (Emphasis ours).

Additional Undisputed Facts Shown by the Record and Not Controverted.

That the error made by petitioner was result of overlooking and failing to include in the amount of bid the cost of pipe or material (R. 77).

That 40,000 feet called for by the contract was ample to complete the project as originally planned, and that the additional quantity of pipe ordered by the respondent was for installation of such pipe in an unoccupied and unsettled section of the sewerage district (R. 76); that the number of house service connections were not shown on the plans and specifications, and bidders in submitting bids on this item had to rely for quantity on the amount of 40,000 feet called for in the proposal (R. 84, 85).

ARGUMENT.

Points 1 and 2.—The decision of the Circuit Court of Appeals as to the claim in question is contrary to the law of the State of Louisiana, and is at variance with the facts found by the trial court; that the decision decides an important question of local law in conflict with the applicable codal law of the State of Louisiana and decisions of highest courts of the State, and is contrary to the equity jurisprudence of the Federal courts of the United States, including the Supreme Court.

Points 1 and 2 relied on in the petition for allowance of the writ, being related, will be considered together.

The most serious error made by the Circuit Court of Appeals, in reversing the judgment of the trial court, was its failure or refusal to apply to a decision of the question involved the law of the State of Louisiana by holding that *"It is of no legal consequence that the contractor's original bid on the house service pipe was erroneously submitted at a figure substantially below the cost to him."* (Emphasis

ours.) This ruling, in effect, denies to the petitioner relief from a serious, unilateral error of fact in submitting his bid, although the respondent had knowledge of the error when it ordered and insisted on petitioner's making the additional installation, which installation, without relief to petitioner because of the error, would result in the enrichment of the respondent at the expense of petitioner in the amount of over $6,000, with legal interest from January 11, 1932.

In this ruling, the Circuit Court of Appeals apparently followed the common law rule which ordinarily grants no relief in law for unilateral errors of fact in the execution of contracts. *Such, however, is not the local law or the law of the State of Louisiana,* which is applicable here under the decisions of this Court. (*Erie* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, and subsequent cases.)

The basic law of the State of Louisiana applicable is found in the revised Civil Code, as follows:

> "Par. 2. What Defects of Consent Will Invalidate a Contract.
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> Art. "1819 (1813) Consent defined—Mistake, fraud or duress—Effect.—Consent being the concurrence of intention in two or more persons, with regard to a matter understood by all, reciprocally communicated, and resulting in each party from a free and deliberate exercise of the will, it follows that there is no consent, not only where the intent has not been mutually communicated or implied, as is provided in the preceding paragraph, but also where it has been produced by—
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> Error;
> Fraud;
> Violence;
> Threats."
>
> "Par. 3. Of Error, Its Division and Effect.
>
> Art. "1820. (1814). Kinds of error.—Error, as applied to contracts, is of two kinds:

1. *Error of fact;* (Emphasis ours)

2. Error of law."

Art. "1821 (1815). Error of fact defined.—That is called error of fact, which proceeds either from ignorance of that which really exists, or from a mistaken belief in the existence of that which has none."

Art. "1823 (1817). Sufficiency of error to invalidate contract.—Errors may exist as to all the circumstances and facts which relate to a contract, but it is not every error that will invalidate it. To have that effect, the error must be in some point, which was a principal cause for making the contract, and it may be either as to the motive for making the contract, to the person with whom it is made, or to the subject matter of the contract itself."

Under the authority of the provisions of the foregoing articles of the Civil Code, the courts of Louisiana have consistently granted relief as the result of unilateral error of fact in the execution of contracts and other commitments, particularly where refusals to grant relief worked an injustice to one of the parties to the advantage or enrichment of the other.

In *Lachman & Jacobi* v. *Block & Bro.*, 47 La. Ann., title page 505, at page 514 of the report, the Supreme Court of Louisiana stated:

"The law does not bind a man irrevocably by his promise made in error, *and admits of any explanation that will avoid the promise.* A very familiar illustration, if any was needed that such promises do not bind, is furnished in the instance of the endorser, who, ignorant of his discharge, promises to pay. *The law permits explanation of his error, holds the promise for naught, and if he has paid on such promise, gives the action to recover back his money.* Storey on Notes, Sec. 361; Citizens Bank *vs.* Dugue, 5 An. 12; Oakey *vs.* Bank, 17 La. 386; Heath *vs.* Bank, 7 Rob. 334." (Emphasis ours.)

In *H. & C. Newman* v. *Scarborough,* 115 La. Rep. 860, the court held in the second syllabus:

> "Where a person signing a guaranty thinks it is for $1,100 when in reality it is for so many thousands, there is error as to the substance of the contract; and the guaranty is binding only up to the amount as to which there was no error."

In the body of the case, at page 864, the Court said:

> "*A consent given in error is no consent, and without consent there is no contract;* hence, in so far as defendant consented to this guaranty in error, it is not her contract and is not binding on her as such. But up to $1,100 she consented to be bound, and as a consequence up to that amount the guaranty is binding upon her.
>
> "The argument of the learned counsel for defendant that error as to part of an agreement vitiates the whole may do well enough when the obligation is indivisible, and must either exist for the whole or not at all; but it can have no force in a case like the present one, where the obligation is divisible. If I agree to sign a note for $1,000, and I sign it for $2,000, I am certainly bound as to the $1,000.
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> "In behalf of plaintiffs it is contended that the error, if error there was, was not induced by plaintiffs, and therefore cannot prejudice their rights under the contract. In support of that contention counsel cites the cases of * * *" (A large number of cases cited omitted).
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> "The cases do not sustain the contention. *It stands to reason that error is error, no matter by whom or by what induced, and that a consent given in error is no consent, and cannot give birth to a contract.*" (Emphasis ours.)

In *Calhoun* v. *Teal,* 106 La. 47, first syllabus, the Supreme Court of Louisiana held:

> "Where there exists error of fact, proceeding either from ignorance of that which really exists, or from a

mistaken belief in the existence of that which has none, and this error was the principal cause of, and bore upon the motive for, yielding consent to a certain business agreement, relief against it may be had."

In the body of the case at page 49, the court said:

"The tract of land contained the 250 acres which Mrs. Calhoun had guaranteed. She therefore owed Teal nothing on account of diminution of quantity. She did not know this when she deeded him 50 other acres to make up the supposed deficiency. She believed the deficiency existed. Teal had insisted to her that it did, and had backed his insistence by suit. She settled this suit by conveying to him the 50 other acres. This was brought about by error of fact on her part, proceeding 'from a mistaken belief in the existence of that which has none.' Rev. Civ. Code, art. 1821. This error was the principal cause for making the contract, and bore upon the motive for making it. Rev. Civ. Code, arts. 1823-1826. She is entitled to be relieved from the consequences of her act thus brought about. And it does not affect the case that Teal himself acted in good faith, and has not profited a dollar in the matter."

In *Lawrence* v. *Mount Zion Baptist Church*, 1 La. App. 404, the court held:

"*Error as to principal cause of a contract, no matter by whom endorsed, vitiates consent and invalidates contract.*" (Emphasis ours.)

The proposal made by the respondent and the bid submitted thereon by petitioner being on a unit price basis, each proposal and each bid thereon, in effect, constituted a separate transaction or agreement, and when petitioner, through excusable error, submitted a unit price bid for furnishing and supplying approximately 40,000 feet of house service pipe at a price far below the actual cost to him, and of which error the respondent had knowledge, and of which respondent took advantage to enrich itself at the expense of

petitioner, there arose, because of error, a want of consent on the part of petitioner as to the transaction relative to this particular item, since the error involved the principal cause or motive of the agreement, which was fair and reasonable compensation to him for agreeing to supply and install 40,000 feet of house service pipe. (Revised Civil Code of Louisiana, Article 1823.)

The learned trial judge, being from the ranks of the Louisiana lawyers and versed in its basic law and in the jurisprudence of the State, correctly applied the law of Louisiana in granting relief to the petitioner, in holding as he did hold that it was "*just*" under the facts and circumstances that petitioner be allowed to recover from the respondent, on a quantum meruit basis, the additional compensation for the installation of the house service pipe beyond the requirements of the contract.

We submit, with all due respect to the Circuit Court of Appeals, that in reversing as it did this just and legal ruling of the trial judge, it seriously erred, disregarded the law and jurisprudence of the State of Louisiana and the equity rule as has been applied by this Honorable Court and other courts, and instead applied the ordinary common law rule by holding that "It is of no legal consequence that the contractor's original bid upon the house service pipe was erroneously submitted at a figure substantially below cost to him."

The Rule Followed by the U. S. Supreme Court and the Equity Rule.

As we understand it, while under the common law rule relief from loss or injustice as result of unilateral error of fact ordinarily is not allowable, in equity, however, relief will be granted. This appears to be the rule in the Federal Courts, as well as the rule followed by many of the courts of other states.

In the case of *Moffett H. & C. Company* v. *City of Rochester,* 178 U. S. 373, 44 L. ed. 1108, where an error was made by contractor in submitting a bid for public work to the City of Rochester, the error made by the contractor in submitting his bid "arose from inadvertently making the cost of one item—mere earth digging and putting the dirt into cars—the total cost without making 'any allowance for any work preparatory to it or connected with it' " (quoting the language of the court). The error made in that case by the contractor is almost identical with the error made by the contractor in the present case (R. 77).

The United States Circuit Court allowed judgment granting the relief sought because of the error. The United States Circuit Court of Appeals reversed the decision of the Circuit Court, and a writ of certiorari was granted by the Supreme Court. The Supreme Court reversed the judgment of the Circuit Court of Appeals and affirmed the judgment of the Circuit Court granting the relief. In the body of the decision, first column, page 1115, L. ed., Mr. Justice McKenna, Organ of the Court, quoted from the decision of the Circuit Court, which we give in part as follows:

> "If the defendants are correct in their contention there is absolutely no redress for a bidder for public work, no matter how aggravated or palpable his blunder. The moment his proposal is opened by the executive board he is held as in a grasp of steel. There is no remedy, no escape. *If, through an error of his clerk, he has agreed to do work worth $1,000,000 for $10, he must be held to the strict letter of his contract, while equity stands by with folded hands and sees him driven into bankruptcy. The defendants' position admits of no compromise, no exception, no middle ground. (82 Fed. Rep. 256).*" (Emphasis ours.)
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> "These remarks," stated Justice McKenna, "*are so apposite and just it is difficult to add to them.*" (Emphasis ours.)

The Moffett Case and the foregoing quoted language of the court is especially applicable to the present case, both in fact and legal and equitable principles involved. In *United States* v. *Hume*, 132 U. S. 406, 33 L. ed. 393, the Court held:

> "Where claimant made a written contract with the United States to furnish to a government hospital a quantity of shucks at the rate of sixty cents per pound, based on proposals made by the Secretary of the Interior, when shucks were only of the market value of from six mills to one and three fourths cents per pound, and those furnished by claimant were only of the latter value, in an action for the price of the shucks delivered, the market value can only be recovered."

In the second syllabus the Court held:

> *"If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to."* (Emphasis ours.)

In the body of the case, at page 410, the Supreme Court quotes from the decision of the Court of Claims as follows:

> "At the time the contract was made shucks were worth from $12 to $35 a ton, or from 6 mills to 1¾ cents a pound, while the claimant was to receive nearly forty times as much as the highest value.
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> "That an agreement to pay $1,200 a ton for shucks, actually worth not more than $35 a ton, *is a grossly unconscionable bargain, defined in Bouvier's Law Dictionary to be 'a contract which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other', nobody can doubt. Such a contract, whether founded on fraud, accident, mistake, folly or ignorance, is void at common law. It is not necessary to invoke the aid of a court of equity to reform it. Courts of law will always refuse to enforce such a bargain, as against*

the public policy of honesty, fair dealing and good morals." (Emphasis ours.)

"*If it be so in suits on contracts between private parties who act by and for themselves,* how much more is it so in suits on agreements by the United States, acting always through public officers, who are mere agents, required to act in good faith towards their principal according to the laws of the land, as everybody dealing with them are bound to know.

"There is no finding by the court of actual fraud by any of the persons engaged in making the contract now under consideration. The unconscionable price inserted for shucks was no doubt a mere accident, perhaps from an idea that it was the price per hundred pounds instead of per pound, as printed in the proposals and contract, and from neglect to change the printed words accordingly, which, if it had been done, would have fixed the price at $12 a ton, the very price which the findings show to have been the lowest value of shucks of any kind at that time. But, however, it may have happened, we hold, as was held in the case of Leland *v.* Stone, from which we have quoted the words of the court, *that a contract may be held unconscionable without proof of actual fraud at its inception if its enforcement would be unconscionable.*" (Emphasis ours.)

In the case of *Hurst et al.* v. *National Bond & Investment Company,* Florida Supreme Court, 117 So. 792, 59 A. L. R. 807, the Court held:

"In the absence of fraud, relief will be granted in equity on ground of a unilateral mistake, where the mistaken party offers to put the other party in status quo, the theory being that the minds of the parties have never met in consummation of a trade under the actual existing conditions."

"The mistake of one party may be of such a character that the minds of the parties can not be said to have met. In such case, if clearly established, it is ground for rescission in equity. Bass *v.* Zinke, (1922)

218 Mich. 552, 188 N. W. 512." (Annotations, 59 A. L. R. 810.)

"*Equity will grant relief by rescission in proper cases for the mistake of one party as readily as for mutual mistake, where it is shown that it would be contrary to equity and against conscience to allow the enforcement of the contract.* Chicago, St. P. M. & O. R. Co. *v.* Washburn Land Co. (Wis.)" (165 Wis. 125, 161 N. W. 358) Annotation, 59 A. L. R. 810.) (Emphasis ours.)

As we understand it, the general rule of equity is that one party to a contract will not be permitted to obtain an unconscionable advantage at the expense of the other party as the result of error merely because the mistake was unilateral. (*Geremia* v. *Boyarsky,* 107 Conn. 387, 140 Atl. 749. (Annotation, 59 A. L. R. 815.)

Point 3.—That the decision of the Circuit Court of Appeals departs from the accepted and usual course of judicial proceedings in appellate courts of the United States in that the Circuit Court of Appeals raised of its own motion and reversed the judgment of the trial judge on an issue or question that had not been urged or submitted as a defense to the claim in the lower court and a question which the learned trial judge was neither called on to consider nor to determine.

As we understand it, the rule is well established by all appellate courts, federal and state, that such courts will consider only questions as were raised and submitted to the lower court; that a theory of liability or non-liability not raised in and submitted to the trial court, and which the adverse party was not called on to meet on trial, can not be raised on appeal either by the litigant or the appellate court.

The general rule is stated in 3 Am. Jur., section 246, page 225 as follows:

"The general rule, subject to certain limitations and exceptions hereinafter noted, is that an appellate court

> will consider only such questions as were raised or reserved in the lower court. *This rule is based upon considerations of practical necessity in the orderly administration of the law and of fairness to the court and the opposite party, and upon the principles underlying the doctrines of waiver and estoppel* * * *", citing in support of the text numerous decisions of the federal courts, including decisions of the Supreme Court of the United States. (Emphasis ours.)

The fact that the record contains evidence bearing on question with respect to which no issue is raised by the pleading and which are not passed on by the trial court will not prevent the operation of the general rule (ib.), Section 246.

> "A plaintiff cannot, on appeal, change to a theory of liability, which, because of the pleadings and method of trial, defendant was not called upon to meet in the trial court." (*Virginian Railway Company* v. *A. J. Mullens,* 271 U. S. 221, 70 L. ed. 916; *Thomas* v. *Taylor,* 224 U. S. 71, 56 L. ed. 763-764).

It will be noted from the decision of the Circuit Court of Appeals, the court invoked the provisions of paragraph 8 of the Specifications as a basis of its decision in reversing, on this issue, the judgment of the trial court, holding that it appears that it was the intention of the parties that said paragraph of the specifications would require the application of the unit price basis in the computation of the increase to the contract in this instance, and that *since it was of no legal consequence that the contractor's original bid upon the house service pipe was erroneously submitted at a figure substantially below its cost to him* the additional compensation should not have been allowed by the trial court (R. 270-271).

As we pointed out in the petition for the writ, no such defense was pleaded or urged by the defendant or respond-

ent. Defendant and respondent did plead and urge plaintiff was not entitled to recover additional compensation on a quantum meruit basis for the installation of the additional 40-odd thousand feet of pipe in excess of the call of the contract, not, however, *because of the provisions of paragraph 8 of the Specifications.* The defense was that plaintiff had *in conversation with the city officials sometime prior to the awarding and execution of the contract* stated he was willing to install any quantity of such pipe that may be required at 26¢ per linear foot; that the plaintiff and petitioner having so stated and agreed, the city had the right to hold him to the commitment regardless of loss to him to the enrichment of the city. No reference was made to paragraph 8 either in the answer, in the conference between the parties, in defendant's testimony, or in argument or briefs filed in the lower court, or in argument or briefs filed in the Circuit Court of Appeals. *Paragraph 8 of the Specifications as a defense was not urged by the defendant and respondent until after oral argument in the Circuit Court of Appeals, during which argument the Court raised of its own motion as a probable defense to the claim paragraph 8 of the contract. Learned counsel for respondent then filed a short supplemental brief and merely stated the issue was controlled by said paragraph 8.*

The case was tried and submitted to the lower court on the question and theory as to whether or not plaintiff's bid was made in error, and if error were made, was plaintiff entitled to the relief sought, regardless of any provision of the contract, and the question of the admissibility and effect of the alleged statement made to and by the petitioner at the conference with respondent's representative had sometime prior to the award and execution of the contract. The decision of the trial court clearly indicates such to be the issues presented.

Plaintiff tried the case to the court on the theory that because of this serious error of fact made by him in submitting his bid on this item, he was entitled to fair compensation on a cost or quantum meruit basis. *Petitioner was given no opportunity to meet on trial, by evidence or otherwise, the issue or defense invoked by the Court of Appeals. This, we respectfully submit, constitutes a departure by the learned Circuit Court of Appeals "from the accepted and usual course of judicial proceedings in appellate courts of the United States,"* and constitutes serious error and works a grave injustice to petitioner.

Point 4.—The learned Court of Appeals having erroneously refused to grant petitioner relief from a serious unilateral error of fact, and having erroneously invoked of its own motion the provisions of Paragraph 8 of the Specifications, as grounds for reversal of the judgment of the learned trial judge, further erred in holding that paragraph 8 of the specifications is applicable and controlling.

Paragraph 8 of the Specifications reads as follows:

> "Alterations:
> "(8) The City reserves the right to make any alteration or changes in the plans of the work or to correct any errors or omissions in the contract, or specifications, or plans at any time, but in case such changes or alteration shall affect the cost of the work, the additions or deductions from the contract price shall be made on the basis named for extra work, except that the unit prices of the Contractor as given in his proposal shall be used as the price for deductions or additions wherever applicable." (R. 198.)

It is apparent that this paragraph plainly refers to changes or alterations in the plans and specifications to take care of errors and omissions.

"To 'alter' means to change or modify the form of character of a thing." (Words & Phrases, Per. Ed. Vol. 3, page 283.)

"The words 'change' and 'alter' may be used interchangeably." (Words & Phrases, Vol. 3, Per. Ed. page 283.)

"The word 'change' appears to imply the substitution of one thing for another; giving up of all or part of a thing and substitution of something different. If no abandonment is intended or contemplated, the word to be used is 'addition'." (Words & Phrases, Per Ed. Vol. 6, page 511.)

The installation of more than 40,000 linear feet of additional house service pipe in excess of the call of the contract certainly is not an alteration or change in the plans and specifications, to cure defects or omissions therein, but clearly constituted an *extra* or *additional* installation of such pipe, covering as such installation did, an uninhabited section of the sewerage district not contemplated to have such connections by the original plans and specifications.

If there be applicable provisions of the specifications which form part of the contract, such provision is found rather in paragraph 6 of the specifications, which reads as follows:

"Extra Work:

"(6) No extra work of any kind will be allowed unless ordered in writing by the Engineer, and all claims for extra labor, or materials, or any other matter or thing for which the Contractor believes himself entitled to extra remuneration, must be made in writing before the extra labor or materials are furnished, or the cause of the claim arises, and no claim will be considered which has not been presented to the Engineer in writing. *In case the City orders any additional work to be done in connection with this work not covered by the unit items, the price which the Contractor*

shall be paid for this extra work shall be fixed upon the following basis: Contractor shall be compensated for the actual cost of all labor in connection with the extra work and all materials which form a composite part of the finished work. He shall also be compensated for all labor and materials, which are necessary to carry on the work, even though the same did not form a composite part of the final work. This refers particularly to such materials as form lumber nails, bolts, rope, chain and materials of like nature. In addition the Contractor will receive fifteen (15%) per cent of the value of the actual cost of the work done as figured from the above mentioned payments. This 15% being an allowance to the Contractor for profits, overhead expenses, office work, office supervision, and furnishing organization." (R. 197.) (Emphasis ours.)

The headings of the two paragraphs indicate they are clearly applicable to different factual situations and contingencies. Paragraph 6 is headed "Extra Work"; Paragraph 8 is headed "Alterations." There is quite a difference in meaning between the words "Alteration or Change" as used in paragraph 8 and the words "Extra or Addition" as used in paragraph 6. The meaning of the words "Extra or Addition" as used in building contracts is given in Words & Phrases as follows:

> "The term 'Extra' in a building contract means something outside of or in addition to that exacted by the contract." (Words & Phrases, Permanent Edition, Vol. 15, page 848.)
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> " 'Extra,' as an adjective or a noun, expresses an idea of something beyond, in addition to or in excess of what is due, usual, or necessary, and as used in building or similar contracts, denotes something done or furnished in addition to, or in excess of, the requirements of such contract; something not required in the performance of the contract." (Words & Phrases, Permanent Edition, Vol. 15, page 848.)

> "The word 'Additional' in common usage means something that is added to or put on a thing already in existence." (Words & Phrases, Vol. 2, Permanent Edition, page 335.)

On the other hand, the meaning or definition of the words "Alterations or Changes", as appearing in paragraph 8, is given as follows:

> "The words 'Change and Alter' may be used interchangeably (Board of Supervisors, Yavapai County, *v.* Stevens, 177 Pac. 261-264, 20 Ariz. 115; Chicago Lbr. & Coal Co. *v.* Garmer, 109 N. W. 780-782, 132 Iowa, 382; Brill *v.* Miller, 125 N. Y. S. 865, 140 App. Div. 602)".
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> "The word 'Alteration' as applied to buildings, has been defined as a change or substitution in the substantial particular of one part of a building for a building different in that particular; a change or changes within the superficial limitation of an existing structure; an installation that becomes an integral part of the building and changes its structural quality; a substantial change therein, a varying or changing the form or nature of such building without destroying its identity." (Words & Phrases, Permanent Edition, Vol. 3, page 290).
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> "The word 'Change' as used in subdivision 17 Par. 3847 Comp. Laws. 1897, implies the substitution of one thing for another, the giving up of all or a part of the line or road and the provision of another railroad in lieu thereof. If no abandonment was contemplated the word used should be 'Addition' instead of 'Change' (Territory *v.* Eastern Ry. of New Mexico, 110 S. W. p. 852, 853, 15 N. M. 591).

It would appear a reasonable interpretation of the language of paragraph 6 is that in case the city ordered additional work beyond or in excess of the quantity covered or called for by the unit item, the Contractor was to be paid therefor on the basis of cost as provided in the paragraph; that the use of the words "additional work"

and "extra work" in the paragraph connote or indicate that the work referred to was to be included in and regulated as to price is any addition to or increase of the quantity or class or kind of work or material *covered by the unit item,* but not included in or covered by the unit item *quantity.*

The provisions of paragraph 6 are clarified, if clarification is needed, by the provisions of paragraph 8, which grant to the city the right to make alterations or changes in the plans of the work, or to correct errors or omissions in the contract, specifications or plans, and provides: "*But in case such change or alteration shall affect the cost of the work, the addition or deduction from the contract price shall be made on the basis named for 'extra work'*" (referring, of course, to paragraph 6) "*except that the unit price of the Contractor as given in his proposal shall be used as the price for the deduction or addition wherever applicable.*" It would appear that it was the intent of the drafter of the two paragraphs (the City's engineer) to make the two provisions, as to prerequisites to recover compensation, the same, *except in paragraph 8 the basis of the compensation to be paid to the contractor for alterations and changes was to be his unit price bid,* which bid price was to be used both for *deductions or additions,* wherever applicable; in other words, all of the prerequisites contained in paragraph 6 in order to entitle the contractor to compensation should apply to the provisions of paragraph 8, except the compensation basis which is made the unit price given in the contractor's proposal, *while in paragraph 6 the compensation basis is made the cost to the contractor.*

If paragraph 6 does not fix the basis for compensation for *additions or extras,* then there is no provision in the contract upon which a price or compensation basis must be fixed where the city requires the contractor to furnish

or supply additional work or material beyond and outside the contract, since it appears clear the provisions of paragraph 8 are not applicable.

There is a clear and controlling reason for this difference of compensation basis. The provisions of paragraph 8 which are to take care of alterations of errors or omissions in the plans and specifications, presents quite a different situation from that where the owner, the city, *voluntarily and deliberately for its own purpose or use* orders and requires additional labor and material on the authority of the provisions of paragraph 6. Paragraph 8 deals with the composite of the project as called for by the plans and specifications and the contract; paragraph 6 on the other hand deals with additional and extra labor and material furnished or supplied on the order of the city beyond and in addition to the composite of the project or the call of the contract, plans and specifications. Paragraph 6 has no reference to such errors or omissions and changes, but is a provision to determine the compensation to the contractor in the event the city desired or saw fit to enlarge any part of the project. Such enlargement was purely voluntary on the part of the city, not made necessary to complete the project as conceived and provided by the plans and specifications.

If it were intended that the unit price basis provided by paragraph 8 shall regulate the compensation to be paid the contractor for any additional work and material the city may see fit to order or regulate, regardless of the quantity or extent thereof, the exercise by the city at will of such unlimited right could easily work serious financial loss to the contractor to the enrichment of the city.

It may well be that such additional work and material may present to the contractor different problems and give rise to a great increase of cost of such additional labor

and material over the unit price bid, limited to an approximate fixed quantity. Such problem and increased cost could not be anticipated by the contractor at the time of his survey and investigation of the project as indicated by the plans and specifications for the purpose of submitting his proposal. The proposal made to the bidders by the city indicated that the quantity of house service pipe to be furnished was approximately 40,000 linear feet; that such quantity was sufficient to complete the project. That there was an undeveloped and uninhabited section of the sewerage district where there appeared no call in the plans and specifications for the installation of house service pipe, for the reason there was no house sewerage service to be rendered. In submitting bids contractors had a right to rely on the unit item quantity; they had no reason to assume that the city would in any case double the unit item quantity. Contractors generally and correctly as a matter of protection against loss before submitting bids on a construction project calling for large quantities of material and labor ascertain the price of the material and take purchase options on the quantity called for by the project. It could well happen that if the contractor were required to purchase and furnish additional material at a later date, contractor may be required to pay a greatly increased price for such material. The same may be said as to labor cost, which also changes from time to time.

It will be noted that the resulting increase or decrease of the contract price caused by the alterations or changes to correct errors or omissions in the contract, specifications or plans was to be used both as an *addition* or *deduction* to or from the contract price, therefore, the provision is just and fair to both city and contractor.

There would necessarily be a limitation on the scope of the change or alteration the city could make in the original plans and specifications under paragraph 8.

> "A building contract, requiring additional payments for changes, additions, and alterations, will be construed to mean such changes as are incidental to the complete execution of the work as described in the plans and specifications, and therefore of only minor or trifling importance; if otherwise, some different mode of determining what prices should be paid for them would also have been prescribed by the writer. We think any material departure from the plans and specifications with reference to which the contract was made, which resulted in a new and substantially different undertaking, cannot be regarded as within the meaning of this language. Cook County *v.* Harms, 108 Ill. 151, 159."

On the other hand, there is no limitation on the additional work and material which the city could order or require under the provisions of paragraph 6.

We submit, that whatever ambiguity or conflict there may be in paragraphs 6 and 8 of the Specifications, that under the well-recognized rules of construction such ambiguity or conflict should be construed against the city, since the contract plans and specifications were prepared by respondent's engineer. "A written contract should in case of doubt be interpreted against the party who has drawn the contract." (*Union Indemnity Co.* v. *Harvey,* (La. App.) 148 So. 501, citing 6 R. C. L. 854, paragraph 242, and decisions of the Court of Appeals and of the Supreme Court of the State of Louisiana; 12 Am. Jur. 795, Section 252).

Further, it is the general rule applicable in interpretation of contracts, as we understand it, that the interpretation should be reasonable and not unjust to either party.

> "A reasonable interpretation will be preferred to one which is unreasonable." Am. Jur. Vol. 12, page 250; Peirpoint *v.* Peirpoint, 71 W. Va. 431, 76 S. E. 848, 43 L. R. A. (N. S.) 783-786, column 2; 17 Am. & Eng. Enc. Law 18, Bishop Contr. Section 400, 417.

Therefore, on the authority and for the reasons set forth herein and in the petition for the writ, we respectfully submit that a certiorari herein should be granted for a rectification of the manifest errors of the Circuit Court of Appeals in reversing in part the judgment of the trial court. And we respectfully urge and appeal to this Honorable Court to grant such a writ in order that this Honorable Court may review the record and grant to the petitioner relief from an injustice and loss in principal and interest of some $10,000, to the enrichment of the respondent, and in order that "the moral maxim of the law that no one ought to enrich himself at the expense of another" may prevail. (Louisiana Revised Civil Code, Article 1965).

The petitioner realizes and fully appreciates the many questions of national importance and concern with which this Honorable Court is burdened, and that its time and effort should and must be conserved; when, however, a question of right and justice is posed and knocks at its door for relief, even though by and on behalf of a sole litigant as to a matter affecting his rights alone, the appeal should not go unanswered.

Respectfully submitted,

P. G. Borron,
Of Borron, Owen & Borron,
Attorneys for Petitioner.

Certificate.

I, Paul G. Borron, of Borron, Owen & Borron, of Baton Rouge, State of Louisiana, certify that I have this day served a copy of the foregoing petition and supporting brief upon H. Payne Breazeale and Roland C. Kizer, of Baton Rouge, State of Louisiana, counsel for respondent, in the above numbered and entitled cause.

This 27th day of July, A. D. 1942.

P. G. Borron,
Attorney.

(1120)